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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Appellate Docket 1962-1963

No. 131

ROBERT E. LEE & CO., INC., and DIXIE CONSTRUCTION COMPANY OF GEORGIA, INC., *Petitioners*,

v.

NATHAN THOMAS VEATCH and THOMAS B. ROBINSON, doing business as BLACK & VEATCH, *Respondents*.

SUPPLEMENTAL STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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We ask the indulgence of the Court in filing this Supplemental Statement in Support of our Petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 24, 1962. 301 F.2d 434.

JUSTIFICATION OF SUPPLEMENTAL STATEMENT

Justification of the Supplemental Statement in support of the Petition for Writ of Certiorari filed in this Honorable Court on May 21, 1962, is predicated upon the very recent case of *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers, et al.*, decided by the United States Court of Appeals for the Second Circuit on June 18, 1962, No. 259—Docket No. 26760, 31 L. W. 2021 (July 10, 1962), which was handed down after the original petition had been filed by Petitioners in the case at bar.

The *Rutland* case, supra, squarely and without equivocation now stands for the proposition that venue can be laid against an unincorporated association under 28 U.S.C. § 1391(c) in any of the judicial districts in which the unincorporated entity is doing business.

We, therefore, now find a direct conflict between (i) the Court of Appeals for the District of Columbia under its ruling in *Brotherhood of Locomotive Firemen* v. *Graham,* 175 F.2d 802 (D.C. Cir. 1948), rev'd on other grounds, 338 U.S. 232 (1949) and the decision of the Fourth Circuit in the case at bar and (ii) *Rutland*, supra, and such a conflict is a customary and accepted ground for the granting of the Writ under Rule 19 (b).

Though *Rutland* was reversed and remanded to the District Court to determine if the Railroad made a reasonable effort to settle the dispute in conference, there can be no question that its holding on venue is the same as that urged as Reason 2 (p. 9, Petition) for the granting of the Writ of Certiorari by Petitioners herein. The entire portion of the *Rutland*

decision dealing with venue is set forth and printed in the Appendix hereto.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that *Rutland Railway Corporation* v. *Brotherhood of Locomotive Engineers, et al.*, supra, is a most persuasive additional reason why the Petition for Writ of Certiorari should be granted.

ROBERT M. HITCH
DAVID L. FREEMAN

Dated: July 25, 1962.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 259—September Term, 1961

(Argued March 8, 1962 Decided June 18, 1962.)

Docket No. 26760

RUTLAND RAILWAY CORPORATION, *Plaintiff-Appellee,*

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., *Defendants-Appellants.*

Before:

WATERMAN, KAUFMAN and MARSHALL, Circuit Judges.

WATERMAN, Circuit Judge:

(Pages 2073-2080 omitted)

Venue

Three of the defendant brotherhoods, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, have their headquarters at Cleveland, Ohio. The headquarters of the fourth brotherhood, Order of Railway Conductors and Brakemen, are at Cedar Rapids, Iowa.

Inasmuch as this action arises under the laws of the United States, namely, the Railway Labor Act, the relevant venue provision of the Judicial Code is 28 U.S.C. § 1391(b):

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The brotherhoods assert that, since they are unincorporated associations, the proper venue for an action against any

one of them is only in the judicial district where its principal place of business is situated.

In *Sperry Prods., Inc.* v. *Association of Am. R.Rs.*, 132 F.2d 408 (2 Cir. 1942), *cert. denied*, 319 U.S. 744 (1943), involving the venue provision for patent infringement actions, Judge Learned Hand discussed the concept of venue as it related to unincorporated associations. The venue statute there involved, 35 Stat. 1084 (1909), 28 U.S.C. § 109 (1940) (now 28 U.S.C. § 1400(b) (1958)), stated that any suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." Judge Hand stated that for venue purposes, as well as for other procedural incidents, an unincorporated association should be considered a jural entity, cf. *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), and that the only practical approach to the procedural problems created by actions involving unincorporated associations was to assimilate their treatment to that accorded corporations. Therefore, Judge Hand concluded that an unincorporated association should be considered "present" wherever it was continuously carrying on a substantial part of its activities, since this was the standard for the "presence" of corporations. However, he hastened to add that being "present" in a district was not tantamount to being an "inhabitant" of that district. Again assimilating the situation of the unincorporated entity which has no place of incorporation to that of the incorporated entity, Judge Hand announced that the unincorporated entity was an "inhabitant" of the district of its principal place of business.

Although *Sperry Prods., Inc.* involved the venue provision for patent infringement actions, courts have applied Judge Hand's reasoning in that case to the determination of questions that have arisen involving the general

venue statute. Until the revision of the Judicial Code in 1948 there was little difficulty in so doing because the general venue statute, 28 U.S.C. § 112 (1940), provided only that "no civil suit shall be brought in any district court against any person * * * in any other district than that whereof he is an inhabitant * * *" Thus Judge Hand's discussion of where an unincorporated association was an inhabitant was applicable with equal force under the general venue provision as it then existed. See *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F.2d 802 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 232 (1949). Cf. *Darby* v. *Philadelphia Transp. Co.*, 73 F. Supp. 522 (E.D. Pa. 1947). But see *Thermoid Co.* v. *United Rubber Workers*, 70 F. Supp. 228 (D.N.J. 1947). But in 1948 the general venue statute was redrafted as 28 U.S.C. § 1391; and a subsection (c) was added. This subsection stated:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."[5]

Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated association resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence.

The cases are divided on this issue. Some courts have held that for determining venue an unincorporated as-

[5] Another difference between the new statute and the old one was that the new one spoke in terms of "residence" instead of "inhabitance"; but it is clear from the Reviser's Notes to § 1391 that the two terms were intended to be synonymous. H.R. Report 308, 80th Cong., 1st Sess. A147 (1947).

sociation resides only at its principal place of business. *Brotherhood of Locomotive Firemen* v. *Graham, supra; McNutt* v. *United Gas Workers*, 108 F. Supp. 871, 875 (W.D. Ark. 1952); *Griffin* v. *Illinois Cent. R.R.*, 88 F. Supp. 552, 555 (N.D. Ill. 1949); *Salvant* v. *Louisville & N. R.R.*, 83 F. Supp. 391, 396 (W.D. Ky. 1949); *Cherico* v. *Brotherhood of R.R. Trainmen*, 167 F. Supp. 635 (S.D. N.Y. 1958). Cf. *Hadden* v. *Small*, 145 F. Supp. 387 (N.D. Ohio 1951). Other courts have held that an unincorporated association may be sued in any district in which it is doing business. *Portsmouth Baseball Corp.* v. *Frick*, 132 F. Supp. 922 (S.D.N.Y. 1955); *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777 (S.D.N.Y. 1958); *Eastern Motor Express, Inc.* v. *Espenshade*, 138 F. Supp. 426 (E.D. Pa. 1956). *And the Supreme Court has not yet spoken on the matter.* (Italics supplied)

Venue in the federal courts is not a jurisdictional concept. See 28 U.S.C. § 1406(b) (1958); H. R. Report 308, 80th Cong., 1st Sess. A154 (1947) (Reviser's Notes). We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience. See *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939); *Cohen* v. *Commodity Credit Corp.*, 172 F. Supp. 803 (W.D. Ark. 1959); *Jacobson* v. *Indianapolis Power & Light Co.*, 163 F. Supp. 218 (N.D. Ind. 1958); *The North River*, 57 F. Supp. 808 (E.D.N.Y. 1944); *Vogel* v. *Crown Cork & Seal Co.*, 36 F. Supp. 74 (D. Md. 1940). It should be treated in practical terms. See *Sperry Prods., Inc.* v. *Ass'n of Am. R.Rs., supra; American Airlines* v. *Air Line Pilots Ass'n, supra.* Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U.S.C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associa-

tions. See *Cherico* v. *Brotherhood of R.R. Trainmen*, *supra*. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius*, and so we follow the reasoning in *Sperry Prods.* and assimilate the residence of unincorporated associations under 28 U.S.C. § 1391(b) to that of corporations, 28 U.S.C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorporated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U.S.C. § 1404(a) (1958).

Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintain grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss.

(Pages 2086-2122 omitted.)